IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 4:05-cv-00329-GKF-SAJ**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

MOTION FOR RECONSIDERATION
OF ORDER COMPELLING DISCOVERY (DKT # 1150)
AND BRIEF IN SUPPORT

COMES NOW the Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA, ("the State"), and respectfully moves for reconsideration of the Court's Order compelling discovery (Dkt # 1150).

Introduction.

On May 17, 2007, the Court entered its order granting in part and denying in part the Cargill Defendants' Motion to Compel discovery. That Order, among other things, correctly found that requirements for a document production pursuant to Rule 34(b) were not as stringent as those in which documents are offered as the answer to an interrogatory pursuant to Rule 33(d). In addition, the Court correctly found that the State's practice of producing its documents in cardboard boxes does not destroy the "ordinary business" character of the production. In that connection, the Court correctly found it acceptable that documents responsive to requests from other defendants can be included in the boxes of documents produced to the Cargill Defendants. The Court, however, then proceeded to order a supplemental Rule 34(b) production by June 16,

2007 with "a complete and fully accurate index" showing "the box number which responds to each specific Motion to Produce," and that there be no documents in a box that are not responsive to a Motion to Produce. Order at p. 7.

While relying upon the proper legal authority, the Court misapprehended that authority and improperly increased the burden upon the State to both direct the requesting party to the location of the responsive documents and provide a "key or index" which does so. More importantly, in its Order, the Court misapprehended the facts of the State's production that will cause the State to suffer a manifest injustice, namely by reproducing its original documents. Additionally, the Court misapprehended the facts by inferring a widespread deficiency of the State's indices based upon two isolated instances of inconsequential defects. Further, the Court ordered the State to ensure that there are no unresponsive documents contained in the State's productions, essentially ordering the State to take the documents out of the usual course of business, because necessarily unresponsive information may be contained in the State's files which contain responsive information. For reasons set forth below, the State respectfully suggests a more focused approach to the needs of the Cargill Defendants with regard to past productions, and a uniform indexing requirement for all parties, including for the State's future productions.

Accordingly, the State asks the Court to reconsider its Order for the following reasons:

1. The document productions done by the State comply with the authority cited by the Order that, in a large document production, the producing the documents direct the requesting party to the location of its files or provide a key or index to assist in locating responsive documents. **Although required by law to do only one of these, the State has already done both**.

2. The indices produced by the State have been adequate to apprise the Cargill Defendants of the location of responsive documents, and the Cargill Defendants have offered no evidence of systemic deficiencies, despite occasional errors in the indices.

3. A full repeat of the on-site document productions done at the Oklahoma Department of Environmental Quality, the Oklahoma Conservation Commission, the Oklahoma Water Resources Board and Oklahoma Secretary of the Environment and, possibly, the Oklahoma Scenic River Commission is unnecessary, overly disruptive to the affected agencies, and overly burdensome and expensive.

4. Under the law, the State may produce incidental unresponsive information to the extent that it is contained in the responsive working files of the agencies as they are kept in the usual course of business. The State will not and has not put unresponsive information in its production in order to confuse the defendants or hide the responsive documents.

As an alternative to repeating these productions, the State suggests:

1. The Cargill Defendants be required to allege with specificity any errors they perceive in the State's designations of request for production on the indices and the State will review the identified entries and correct them where appropriate to state where responsive documents have been produced.

Legal Standard

Grounds justifying reconsideration include "(1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice." *Servants of the Paraclete v. Does,* 204 F.3d 1005, 1012 (10th Cir. 2000). "Thus, a motion for reconsideration is appropriate where the court has misapprehended the facts, a party's position, or the controlling law." *Id.*

1. The indices prepared by the State are supplementary to the State's direction of the Cargill Defendants to its requested documents, and are adequate to assist the Cargill Defendants to locate requested documents.

A. The authorities relied upon in the Order do not require both identification of responsive documents and a key or index, and rejected any requirement that responsive documents be identified by request number.

In entering its Order, the Court relied heavily upon *U.S. Commodities Futures Trading Commission v. American Derivatives Corp.*, 2007 WL 1020838 (N.D. Ga. 2007), which dealt with the special circumstances of a large production and which required the producing party either to direct the requesting party to the specific location of files containing requested

documents or to provide a "key or index" to assist Plaintiff in locating the responsive documents, 2007 WL 1020838 at *5. Thus, either option (directing the requesting party to the location of the responsive documents, or providing a "key or index" which does so) is enough to fulfill the obligation of producing documents as kept in the usual course of business. In effect, these alternatives both reasonably point the requesting party to the requested documents. This is the functional equivalent of the State's policy of placing the responsive documents in boxes for review by the Defendants and is analogous to the litigation "reading room" approved by the court in *Williams v. Taser International, Inc.*, 2006 WL 1835437, *5. Theoretically, the State could have shown the Defendants which file drawers contained the requested documents and let them review them from the drawers.

However, nothing in *American Derivatives* requires the State to both direct the Cargill Defendants to the location of the documents and to provide a "key or index" to them. Similarly, *American Derivatives* rejected a requirement to label the documents produced as kept in the usual course of business by request, so long as the party was directed to the specific location or given an index or key to their location, 2007 WL 1020838, * 4-5, as did *Taser International* 2006 WL 1835437, *7 (Therefore, insofar as Plaintiffs request this Court to compel Taser to organize and label documents according to their specific requests, their motion is denied.). In imposing upon the State the burden of providing an index according the specific requests, the Court erroneously went beyond its supporting authority and changed the State's option to produce documents as kept in the usual course of business to a requirement that it index the production according to the categories in the requests.

B. The Court erred in requiring a rewriting of the State's indices which are generally sufficient, even standing alone, to assist the Cargill Defendants to locate requested documents.

The Court erred in extrapolating from two insignificant errors identified by Cargill Defendants in the State's indices to find a systemic problem requiring the wholesale rewriting of those indices without identification of any other areas of alleged deficiency. The State's indices for three document productions are before the Court as exhibits to the Cargill Defendants' motion to compel. See Ex. 6-9. Additionally, counsel for the Cargill Defendants presented an affidavit supporting the motion to compel. Ex. 5. Nowhere in that affidavit did that counsel, who has been present at the State's on-site document productions for the Cargill Defendants, claim that she could not locate the requested documents.

The Cargill Defendants served extremely broad, wide-ranging, and overlapping requests for production of documents. For instance, both Cargill Defendants asked the State to produce "all documents alleged to support Plaintiffs' claims in this matter." Cargill served three Requests seeking documents referred to or relied upon in response to its interrogatories (as well as all documents alleged to support the State's claims), while Cargill Turkey served fifty-eight more specific requests. In response, the State has produced documents as kept in its own files in the usual course of business. For each on-site agency document production, the State has prepared an index of documents produced, and had an attorney available to answer questions about the production.

At the hearing on April 27, 2007 counsel for the Cargill Defendants, without prior notice of the substance of his complaints to the State (despite numerous opportunities to do so), criticized the State's indices in two particulars. First, counsel complained that no health warning documents responsive to Cargill Turkey RFP No. 36 were found in box 13A at the Oklahoma

Conservation Commission, as indicated in the State's index. Tr. 9, l. 7-24 and Ex. 7 to Motion to Compel, p. 5 of 11. Counsel chose the fifth entry on this page (one of 19 entries for box 13A) and claimed that, despite the fact the index for that entry showed documents requested in Cargill Turkey RFPs 34-39 were in the box, none were found as requested by No. 36, dealing with health warnings. Counsel is correct. The entry should have read that Box 13A contained documents responsive to Cargill Turkey RFPs 37-39, documents responsive to which were in box 13A. However, this single error in a single entry for a single box in a document production of 115 boxes is inconsequential in the extreme because in no way did it prevent the Cargill Defendants from locating requested documents.

The second supposed failing of the indices appears to be that the Cargill Defendants found certain documents (waved around in court but not identified) about the operations of third party defendants (Cargill Turkey RFP No. 11) in boxes 1, 5 and 6 from the legal division at the Oklahoma Department of Environmental Quality, while the index did not identify those boxes as containing documents about third party defendants. Tr. 10, l. 21 – Tr. 12, l. 5 and Exhibit 6 to Motion to Compel p. 1, first eight entries. However, the index for the eight boxes produced from the DEQ legal division each report documents requested in no fewer than four Requests for Production served by Cargill Turkey. Thus, Cargill Turkey was fairly notified it should examine documents in those boxes, did examine them, and copied some which counsel waved around in court. The State does not know what the Cargill Defendants copied because they (incorrectly) claim the documents selected are protected work product. However, giving the Cargill Defendants the benefit of the doubt that the waved documents actually did have something to do with the operations of third party defendants, Cargill's discovery has not been impeded by failing to note that Request on its index. The State clearly produced the responsive documents in its

production of 124 boxes of documents at the ODEQ, and the flaw in the index, if it was a flaw, was harmless.

Before the hearing of April 27, the Cargill Defendants had been inspecting the State's documents for months and had copied the documents it found of interest. The criticisms of the State's indices that they actually made are insignificant; especially in the context of a production of the size the State has made (Over 400 boxes and 1 million pages). The Cargill Defendants do not dispute that they were given all the responsive documents at the agencies. The two insignificant errors identified by the Cargill Defendants do not justify a wholesale rewriting of the State's indices.

2. Repeating the State's on-site productions is unnecessary, overly burdensome and disruptive to the public agencies involved, and will yield no new discovery to the Cargill Defendants.

As the briefing and argument has indicated, the State has produced original copies of its documents for inspection by the Defendants, including the Cargill Defendants, as they are kept in the usual course of business, in boxes at a central location at each agency. This arrangement is analogous to the litigation "reading room" approved by the court in *Williams v. Taser International, Inc.*, 2006 WL 1835437, *5. This has required removing hundreds of boxes of the State's active files for the inspection of the Defendants. In addition, by agreement of the parties, groups of ten boxes at a time of the State's original documents have been provided to a copy service chosen by the Defendants for off-site copying. Upon return of each group of boxes, another group of boxes has been sent for off-site copying. Even without knowing exactly what the Cargill Defendants have copied, it is clear that they have copied for their later analysis a large volume of documents produced by the State.

In some instances, the requested documents are still reasonably available to be inspected yet again. In other instances, the requested documents have been replaced in the files. As evidenced by the affidavits of Barbara Rausch, of the Oklahoma Department of Environmental Quality (Exhibit 1 hereto), Dean Couch, General Counsel of the Oklahoma Water Resources Board (Exhibit 2 hereto), Joann Stevenson, assigned counsel to the Oklahoma Conservation Commission (Exhibit 3 hereto), and Ed Fite, Administrator of the Oklahoma Scenic Rivers Commission (Exhibit 4 hereto), it would cause great disruption to the operations of these agencies to require them to produce yet again the hundreds of boxes already produced.

Such production is also unnecessary, because the Cargill Defendants have produced no evidence demonstrating that they have been unable to locate requested documents. Instead, they have spent their energy in an attempt to require the State to label documents already produced to correspond to their requests, something rejected by *American Derivatives* and *Taser International* and not required by the plain text of Rule 34(b).

The Cargill Defendants have served broad, wide ranging, document requests. In response, the State has produced a large volume of requested documents. Now, counsel for the Cargill Defendants complains that they cannot work with the documents they have copied:

> My final authority on the issue of documents, the supreme court of me as to how our production is being handled, Candy Smith advises that what we have, it's impossible to work with what we have. That the number of hours that would be required to redo the work simply doesn't exist.

Tr. 9, l. 6-10. It appears that the Cargill Defendants have asked for and copied more documents than they can work with. Producing the original documents again will not solve that problem. Moreover, producing all of these documents again will unnecessarily squander the time of the State. Just as much for the State as for Cargill, "the number of hours that would be required to

redo the work simply doesn't exist."

3. A more sensible and economical alternative is to require the Cargill Defendants to allege with specificity which requested documents they have not found, focusing the inquiry on such documents, rather than producing for a second time documents not needed.

A focused production of documents more closely comports with the requirements of Rule 26(b)(2) in circumstances in which the burden or expense of the proposed discovery outweighs its likely benefit, and the importance of the proposed discovery in resolving the issues. The Cargill Defendants, as evidenced by counsel's comments, do not need to see most of the requested documents a second time. Indeed, their Motion to Compel, as originally framed, did not request a complete second production. The benefit of a full second production is far less than the expense and inconvenience to both parties. Moreover, upon actually reviewing the documents together with the previously produced indices, the State believes the Cargill Defendants will indeed locate the documents they have requested.

As a practical matter, the Cargill Defendants would not look at all the documents again. Instead, they would look at the documents they had not found on the first viewing of the documents. Rather than producing all of the documents a second time, when some smaller set of the documents is actually what the Cargill Defendants need, the State respectfully suggests that the Cargill Defendants be required to allege with specificity any errors they perceive in the State's designations of request for production on the indices and the State will review the identified entries and correct them where appropriate to state where responsive documents have been produced. This more focused approach should save time, expense and inconvenience for both the Cargill Defendants and for the State.

Without receding from its belief, based on the arguments and authorities set forth herein, prospectively the State will produce an "index or key" to its production at the level of specificity

required by the Court's Order (matching box number with request or if bates numbered, matching the bates number with the request) subject to the requirement that the Defendants, by operation of the "goose and gander" rule, will also be required to index their production, by box or Bates number, with equal specificity, and demonstrate that their production has been made as documents are kept in the usual course of business.

4. The State should be relieved of the burden of removing incidental unresponsive information as that will take the documents out of the usual course of business.

The Court erred in requiring the State to remove all nonresponsive documents from productions made under the "usual course of business" option. As explained in the *American Derivatives* case cited by this Court, Opinion at p. 5, that while the party producing "cannot attempt to hide a needle in a haystack by mingling responsive documents with large numbers of nonresponsive documents, the plain language of Rule 34 makes clear that "a responding party has no duty to organize and label the documents if it has produced them as they are kept in the usual course of business." Implicit in this statement by the *American Derivatives* court is the recognition that incidental nonresponsive documents that are part of the business records need not be removed.

As represented to this Court at the April 27, 2007 hearing, the only "unresponsive" documents that will be produced in the files of the State are those documents that are: (1) documents referring to locations outside the watershed, but within the counties encompassing the IRW (because certain documents are kept by county and the State's production necessarily covered the counties encompassed by the IRW, even though some of the documents referred to locations outside the IRW); (2) responsive to requests from another Defendant other than the Cargill Defendants; or (3) incidental documents which may not be responsive, but which are contained within a file which contains responsive information. There should be no other

unresponsive information other that those listed above and it will be a huge burden to go through and take apart the State's files.

The Court ordered the State to remove any unresponsive information from its production. As this Court has already found the State has produced documents as they are kept in the usual course of business. If the State has to review and remove documents because they are unresponsive in the three instances listed above then the State will necessarily be altering or disassembling files of documents as they are kept in the usual course of business. This is a burden which the State should not have to bear. The State has not and will not put in unresponsive documents in order to confuse or otherwise hinder the Cargill Defendants' search for responsive information. The State does not believe that the production of "unresponsive" documents as indicated herein has prohibited, or will in any way prohibit the Defendants from locating responsive documents.

CONCLUSION

In order to correct errors causing manifest injustice in the Court's Order, the State respectfully requests the Court to reconsider and revise its Order, deleting the requirement of a wholesale revision of its indices and repeat of the State's on-site document productions, and the requirement that nonresponsive documents not be produced in the three circumstances set forth herein, in favor of the more focused approach set forth herein.

Respectfully Submitted,

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I hereby certify that on this 29th day of May, 2007, I electronically transmitted the attached document to the following:

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